In the result the application to set aside the writ is dismissed. I allow the application to set aside the statement of claim and service thereof. The time for delivery of the statement of claim is extended to 10 days from date hereof. Plaintiff to pay the 2nd defendant the taxed costs of this motion.

Order accordingly.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Singh & Co.*

WEARNE BROTHERS (M) LTD. v. JACKSON

[A.C.J. (Abdul Aziz J.) April 19, 1966]

[K.L. — Civil Appeal No. 26 of 1965]

Hire Purchase — Breach of agreement — Provision for compensation in agreement whether a penalty clause or a genuine pre-estimate of damage — Contracts (Malay States) Ordinance, 1950, s. 75.

This was an appeal against the award of damages for breach of contract in respect of a hire purchase agreement relating to a motor car. The main ground of appeal was that the learned president of the sessions court failed to consider whether the relevant clause in the hire purchase agreement was a penalty clause or was a genuine pre-estimate of the damage as on the date of the agreement. The learned president merely applied the common law principle for the assessment of damages for breach of contract.

Held: (1) whether the clause in the agreement was a penalty clause or not was irrelevant in view of section 75 of the Contracts (Malay States) Ordinance, 1950, which provides that in every case the court must determine what is the reasonable compensation. The effect of the section is that the plaintiff is disentitled from recovering simpliciter the sum fixed in the contract whether as penalty or liquidated damages and must prove the damages suffered by him unless the sum named is a genuine pre-estimate;

(2) in the case the clause in the agreement gave a genuine pre-estimate of the damages for depreciation contemplated by the parties at the time when they entered into the contract and as the damages fixed by the parties did not appear to be unreasonable or disproportionate to the nature and extent of the depreciation, the court would award such damages.

Cases referred to:—

(1) *Maniam* v. *State of Perak* [1957] M.L.J. 75.

(2) *Bhai Panna Singh* v. *Bhai Arjun Singh* A.I.R. 1929 P.C. 179.

(3) *Lamdon Trust Ltd.* v. *Hurrell & Anor.* [1955] 1 W.L.R. 391; [1955] 1 All E.R. 839.

CIVIL APPEAL.

Eugene Lye for the appellant.

V. Oorjitham for the respondent.

Abdul Aziz J.: This is an appeal against the award of damages given by the president, sessions court, Kuala Lumpur in respect of a breach of a hire purchase agreement. The main ground of appeal was that the learned president failed to consider whether clause 6 of the hire purchase agreement was a penalty clause or was a genuine pre-estimate of the damage as on the date of the agreement.

The facts are not in dispute and they are briefly as follows: The defendant entered into an agreement with the plaintiff firm for the hire purchase of a Morris saloon car. The hire purchase agreement produced before the court contains terms and conditions usually employed by motor firms generally, one of which (clause 6) reads as follows:—

"If the owner retakes possession under clause 3 hereof the hirer shall pay to the owner by way of compensation for depreciation the amount, if any, by which one-half of the hire purchase price exceeds the total of the sums paid and the sums due in respect of the hire purchase price immediately before retaking possession, together with any other sums due and payable hereunder at the date of the termination aforesaid."

On the 25th June 1964 the defendant was in arrears of instalments whereupon the plaintiff terminated the hire purchase agreement and repossessed the car. On the date of the termination of the agreement the defendant had paid eight monthly instalments out of twenty-four and including a sum paid at date of execution. This amounted to $1,563.10. After repossession the car was subsequently sold by the plaintiff firm for $3,400. The plaintiff now claims by way of compensation for depreciation under clause 6 the sum of $1,470.70 made up as follows:—

Hire purchase price	=	$5,987.60
½ hire purchase price	=	2,993.80
Add repossession expenses	=	40.00
		3,033.80
Less payment received	=	1,563.10
Balance due	=	1,470.70

The learned president in his grounds of judgment made no specific finding as to whether clause 6 was a penalty clause or liquidated damages but merely applied the common law principle for the assessment of damages for breach of contractual obligations and in applying this principle took into account the resale value of the car and other factors and consequently awarded damages of $239.80. Against that decision the plaintiff has now appealed.

A number of English authorities were quoted before me in support of the appeal on the question of penalty and damages, none of which, with respect was strictly relevant to the appeal. In my view the matter falls to be considered under section 75 of the Contracts (Malay States) Ordinance 1950 which is *in pari materia* with section 74 of the Indian Contract Act and which reads:—

"75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other

stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The distinction between liquidated damages and penalty has ceased to be of great legal importance because the result in either case is that the court must determine reasonable compensation. As has been said in *Maniam* v. *State of Perak*,[1] "this section boldly cuts the most troublesome knot in the Common Law doctrine of damages". Also in *Bhai Panna Singh* v. *Bhai Arjun Singh* [2] the Privy Council considered the implication of section 74 and stated that the effect of that section is to disentitle the plaintiff to recover simpliciter the sum fixed in the contract whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered unless the sum named is a genuine pre-estimate.

In *Lamdon Trust Ltd.* v. *Hurrell & Anor.*[3] Denning L.J. considered the depreciation clause in a hire purchase agreement which is somewhat similar to our present case. In that case the defendant acquired a car from the plaintiff under a hire purchase agreement. The agreement provided that in case the defendant defaulted the plaintiff would receive by way of compensation for depreciation £425 (three quarters) less instalments already paid. After paying £302 16s. the defendant defaulted and the plaintiff repossessed and later resold the car for £270 and thus received £572 16s. instead of the hire purchase price of £558 16s. Not content with the profit of £14 8s. the plaintiff brought an action to recover £122 4s. under the depreciation clause. It was held that the compensation for depreciation fixed at 75% of the price according to the usual practice, regardless of the condition and state of affairs of the car could not be a genuine pre-estimate of damages, that the sum of £425 was an extravagant and extortionate sum held in terrorem over the head of the hirer and that it was a penalty and as such was not recoverable in law. Denning L.J. in his judgment stated:—

"The sole question for me is, therefore, whether this clause is a penalty clause. I reserved my decision on this question because of the large number of cases which will be affected by it. In considering this question, I take into account these circumstances: (1) The £425 is three-quarters of the total price. It is inserted by the hire-purchase companies by rule of thumb without regard to the make of car, its age, the market conditions or anything of the kind. It is the same for all. (2) The £425 payment for compensation for depreciation is payable on the footing that the car, when it is retaken, is in good order, repair and condition. If it is in bad condition, the owners can recover damages for breach of agreement under clauses 3 and 8 and 15(a), and these damages are payable in addition to the £425. (3) Assume that the car is kept in good condition, and at the end of the first month the hirer makes default and the owners retake the car. Can anyone suppose that in that time the value of it will have dropped by three quarters so that it will be worth only one-quarter of what it was worth a month before? It is an altogether extravagant thing to imagine. (4) Next assume that the car is kept in good condition and at the end of six months the hirer makes default and the owners retake the car. One can understand that it might have dropped to one-half of its value, but not as much as three-quarters. Indeed, when the matter was put to the test, the drop was only one half. (5) Lastly, suppose that the car was let on a simple hiring (without a purchase clause) and the hiring was for one month, or even for six months. The hiring charge would be quite modest — nowhere near £425 — and yet it would have to cover depreciation."

His Lordship then went on to consider the cases where the owners have recovered three-quarters of the depreciation and then went on to conclude:—

"In the present year, 1955, I must, I think, approach the matter afresh in the light of the different circumstances which now exist from the time at which those earlier decisions were given. Looking at this agreement and the conditions under which it was made, I am of opinion that the sum of £425 was not a genuine pre-estimate of damage but was an extravagant and extortionate sum held in terrorem over the head of the hirer. It is a penalty and, as such, it is not recoverable in these courts."

The same consequence need not necessarily follow in our case. Here the depreciation has been fixed at one half of the value of the car for the use from anything from one month to twelve months. It is, of course, a matter of common knowledge that the value of a new car would depreciate as soon as it was taken out of the garage and the claim here was that the car costing $5,987.60 had depreciated by $1,470.70 in approximately eight months. Having regard to the nett resale price I am not prepared to say that the depreciation of $1,470.70 is unreasonable. It appears to me to be a genuine pre-estimate of the damages for depreciation contemplated by the parties at the time when they entered into an agreement. The damages fixed by the parties do not appear to be unreasonable, disproportionate to the nature and extent of depreciation as to warrant the court to interfere to grant relief.

The appeal will, therefore, be allowed to the extent that $1,470.70 be substituted for the award of $239.80 as damages for the breach of the hire purchase agreement. Respondent to pay costs in this court and the court below.

Appeal allowed.

Solicitors: *Eugene Lye & Co.; Oorjitham & Lam.*

KHOO PENG LOONG & ORS. v. SUPERINTENDENT OF LANDS AND SURVEYS, THIRD DIVISION

[O.C.J. (Lee Hun Hoe J., Ong Yen Jin and Ting Lieng Poh, assessors) April 19, 1966]

[Sibu — High Court Civil Suits No. 3 — 6 of 1966]

Land laws — Acquisition of land — Procedure — Amount of compensation — Market value — Land Code (Sarawak Cap. 81), ss 47, 51 & 56.